

2008

Dee Henshaw v. The Estate of Jack King : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Charles A. Schultz; attorney for appellant.

David R. Williams, Anthony M. Grover; Woodbury and Kesler; attorneys for appellees.

Recommended Citation

Legal Brief, *Henshaw v. Estate of King*, No. 20080715 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1119

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

DEE HENSHAW

Plaintiff,

vs.

THE ESTATE OF JACK KING,

Defendant.

Court of Appeals No. 20080715

District Court No. 00600007

PETITION FOR REHEARING

This is a Petition for Rehearing of the Court's December 24, 2009 Memorandum Decision, affirming the trial court's denial of Mr. Henshaw's Rule 60(b) Motion to set aside that portion of the trial court's Order on Motions for Directed Verdict holding Raymond Watrous' interest in the water rights the Kings sold to the Watrouses did not ultimately pass to Mr. Henshaw through a series of deeds from the Kings to the Watrouses and ultimately to Mr. Henshaw, due to the Kings lack of standing to even assert that Raymond Watrous' interest in the water rights did not ultimately pass to Mr. Henshaw through a series of deeds from the Kings to the Watrouses and ultimately to Mr. Henshaw

David R. Williams
WOODBURY AND KESLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111-3358

Charles A. Schultz
222 West 700 South
Brigham City, Utah 84302
FILED
UTAH APPELLATE COURTS

JAN 11 2010

IN THE UTAH COURT OF APPEALS

DEE HENSHAW	
Plaintiff,	
vs.	
THE ESTATE OF JACK KING,	Court of Appeals No. 20080715
Defendant.	District Court No. 00600007

PETITION FOR REHEARING

This is a Petition for Rehearing of the Court's December 24, 2009 Memorandum Decision, affirming the trial court's denial of Mr. Henshaw's Rule 60(b) Motion to set aside that portion of the trial court's Order on Motions for Directed Verdict holding Raymond Watrous' interest in the water rights the Kings sold to the Watrouses did not ultimately pass to Mr. Henshaw through a series of deeds from the Kings to the Watrouses and ultimately to Mr. Henshaw, due to the Kings lack of standing to even assert that Raymond Watrous' interest in the water rights did not ultimately pass to Mr. Henshaw through a series of deeds from the Kings to the Watrouses and ultimately to Mr. Henshaw

David R. Williams
WOODBURY AND KESLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111-3358

Charles A. Schultz
222 West 700 South
Brigham City, Utah 84302

TABLE OF CONTENTS

Page

ARGUMENT

THE COURT’S FACTUAL CONCLUSIONS AS WELL AS ITS LEGAL CONCLUSIONS ARE INCORRECT:	1-15
---	------

POINT I

THE COURT’S CONCLUSION THAT “ <i>THE KINGS’ CHALLENGE TO HENSHAW’S OWNERSHIP OF THE WATER RIGHTS WAS PART OF THE KINGS’ DEFENSE TO HENSHAW’S QUIET TITLE AND EASEMENT CLAIMS</i> ” IS INCORRECT:	1-3
--	-----

A. <u>The Kings Never Asserted, As An Affirmative Defense To Either Mr. Henshaw’s Complaint Or Amended Complaint, That Mr. Henshaw Was Required To Prove Raymond Watrous’ Water Rights Passed To Mildred Watrous Upon Raymond Watrouses’ Death.</u> :	1
B. <u>The Kings Waived Any Right They May Have Had To Assert That Mr. Henshaw Was Required To Prove Raymond’s Water Rights Passed To Mildred Upon Raymond’s Death, Then To Mrs. Henshaw, And Ultimately To Mr. Henshaw, As An Affirmative Defense To Either Mr. Henshaw’s Complaint Or Amended Complaint.</u> :	1-2
C. <u>The Court Cannot Construe The Kings’ Counterclaim As An Answer Or As An Affirmative Defense.</u> :	2-3

POINT II

THE COURT’S ASSERTION THAT “ <i>ALTHOUGH HENSHAW DID NOT INITIALLY ASSERT A QUIET TITLE OR EASEMENT ACTION, THE TRIAL COURT CONFORMED THE PLEADINGS TO THE EVIDENCE SO THAT HENSHAW’S CLAIMS TO WATER RIGHTS AND AN EASEMENT WERE AT ISSUE,</i> ” IS FACTUALLY AND LEGALLY INCORRECT.:	3-8
--	-----

A. <u>The Court’s Assertion That “<i>Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw’s Claims To Water Rights And An Easement Were At Issue,</i>” Is Factually Incorrect.</u> :	4-5
---	-----

	<u>Page</u>
B. <u>The Court's Conclusion That "Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue," Is Legally Incorrect.</u>	5-6
C. <u>Both As A Legal And Factual Matter, The Kings' Counterclaim Could Not Be An Affirmative Defense To Any Claim Of Ownership Of Raymond Watrous' Water Rights By Mr. Henshaw, As The Court Incorrectly Concludes.:</u>	6-7
D. <u>The Kings Were Required To Prove At The Time Mr. Henshaw First Challenged Their Standing That They Had Standing To Assert That Raymond's Interest In The Water Rights Did Not Pass To Mildred Upon Raymond's Death.:</u>	7-8

POINT III

THE COURT'S CONCLUSION THAT MR. HENSHAW HAD THE BURDEN OF ESTABLISHING OWNERSHIP OF WATER RIGHTS IS INCORRECT.: . . . 8-11

A. <u>Both As A Matter Of Fact And As A Matter Of Law, Mr. Henshaw Did Not Have The Burden Of Establishing Ownership Of The Water Rights.:</u>	8
B. <u>The Kings Had The Burden Of Proving That Mr. Henshaw Did Not Own Raymond Water Rights, Which Were Transferred To Mrs. Henshaw After Raymond's Death And Ultimately To Mr. Henshaw From Mrs. Henshaw.:</u>	8-11

POINT IV

THE COURT'S CONCLUSION THAT "THERE IS NO STANDING ISSUE HERE BECAUSE THE DIRECTED VERDICT IN FAVOR OF THE KINGS WAS NOT ENTERED ON A CLAIM ASSERTED BY THE KINGS," IS FACTUALLY AND LEGALLY INCORRECT.: 12-15

A. <u>By Filing Their Counterclaim, The Kings Became Plaintiffs And Became Obligated To Establish That They Have Standing To Assert That Raymond Watrous' Interest In The Water Rights They Sold To The Watroues Did Not Ultimately Pass To Mr. Henshaw.:</u>	12-13
---	-------

	<u>Page</u>
B. <u>Even If The Court Was Correct And The Kings’ Counterclaim Could Be Construed As A Defense To Mr. Henshaw’s Amended Complaint, The Kings Are Still Required To Prove They Have Standing To Assert That Raymond’s Water Rights Did Not Pass To Mildred On Raymond’s Death And Ultimately To Mr. Henshaw.:</u>	13-15
<u>CONCLUSION:</u>	15
<u>CERTIFICATE OF SERVICE:</u>	16

TABLE OF AUTHORTIES

UTAH CODE:

UCA §57-1-12:	9
---------------------	---

CASES:

<u>Bown v. Loveland</u> , 678 P.2d 292 (Utah 1984):	10-11, 14
<u>Corey v. Roberts</u> , 82 Utah 445, 25 P.2d 940 (1933):	11
<u>Gedo v. Rose</u> , 2007 P.3d (2007 Ut. App 154):	3
<u>Hatch v. Bastian</u> , Utah, 567 P.2d 1100 (1977):	3
<u>In re Estate of Hock</u> , 655 P.2d 1111(Utah 1982):	11
<u>Jacobson v. Jacobson</u> , 557 P.2d 156 (Utah 1976):	11
<u>Jenkins v. Swan</u> , 675 P.2d 1145 (Utah 1983):	3-12
<u>Nikols v. Goodman & Chesnoff</u> , 206 P.3d 295 (Ut. App. 1009):	11
<u>Northcrest, Inc. v. Walker Bank & Trust Co.</u> , 248 P.2d 692 (Utah 1952):	11
<u>Petrofesa v. Denver & Rio Grande Western R. Co.</u> , 169 P.2d 808, 110 Utah 109 (1946):	9-11, 14

	<u>Page</u>
<u>Pollei v. Burger</u> , 464 P.2d 377, 23 Utah 2d 381 (1970):	10-11, 14
<u>Roberts v. Roberts</u> , 584 P.2d 378 (1978):	10-11, 14
<u>Sill v. Hart</u> 128 P.3d 1215, (Ut. App. 2005):	2-3, 12
<u>State ex rel. Road Comm'n v. Parker</u> , 13 Utah 2d 65, 368 P.2d 585 (1962):	2-3
<u>Stephens v. Burton</u> , Utah, 546 P.2d 240 (1976):	10-11, 14
<u>Thornley Land & Livestock Co. v. Gailey</u> , 105 Utah 519, 143 P.2d 283 (1943):	11

ARGUMENT
THE COURT'S FACTUAL CONCLUSIONS AS WELL AS ITS LEGAL CONCLUSIONS ARE INCORRECT.

POINT I
THE COURT'S CONCLUSION THAT "*THE KINGS' CHALLENGE TO HENSHAW'S OWNERSHIP OF THE WATER RIGHTS WAS PART OF THE KINGS' DEFENSE TO HENSHAW'S QUIET TITLE AND EASEMENT CLAIMS*" IS INCORRECT.

- A. The Kings Never Asserted, As An Affirmative Defense To Either Mr. Henshaw's Complaint Or Amended Complaint, That Mr. Henshaw Was Required To Prove Raymond Watrous' Water Rights Passed To Mildred Watrous Upon Raymond Watrouses' Death.**

Contrary to the Court's conclusion, the Kings never asserted in either their answer to Mr. Henshaw's Complaint or to his Amended Complaint that he was required to prove Raymond Watrous' (hereinafter, "Raymond") water rights passed to Mildred Watrous (hereinafter, "Mildred") upon Raymond's death. The only affirmative defenses the Kings asserted in response to Mr. Henshaw's Complaint or his Amended Complaint are:

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted; Plaintiffs' claims are barred by the equitable doctrine of waiver, estoppel and laches; There is no contract between Plaintiffs, or any of them, and the Defendant; Plaintiffs' claims are barred by failure of consideration; Plaintiffs' claims are barred by the statute of limitations. (Record at 652).

Contrary to the Court's conclusion there is simply nothing in the record of this case that indicates that the "*The Kings' challenge to Henshaw's ownership of the water rights was part of the Kings' defense to Henshaw's quiet title and easement claims.*"

- B. The Kings Waived Any Right They May Have Had To Assert That Mr. Henshaw Was Required To Prove Raymond's Water Rights Passed To Mildred Upon Raymond's Death, Then To Mrs. Henshaw, And Ultimately To Mr. Henshaw, As An Affirmative Defense To Either Mr. Henshaw's Complaint Or Amended Complaint.**

In pertinent part, Rule 12 URCP provides:

(h) Waiver of defenses. A party waives all defenses and objections not presented either

by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The record for this case also unequivocally proves that the Kings never asserted in any motion, that Mr. Henshaw was required to prove that Raymond's water rights passed to Mildred upon his death, then to Mrs. Henshaw and ultimately to Mr. Henshaw. Therefore, the Kings have waived any right they may have had to assert that Raymond's water rights passed to Mildred upon his death, then to Mrs. Henshaw and ultimately to Mr. Henshaw, as an affirmative defense.¹

C. The Court Cannot Construe The Kings' Counterclaim As An Answer Or As An Affirmative Defense.

Although not specifically stated, it appears from the Court's Memorandum Decision that the Court is considering the Kings' counterclaim as an affirmative defense or some sort of amendment to their answer. If that assumption is true, the Court improperly did so.

Utah law holds that a counterclaim is a counterclaim and not an answer or an affirmative defense. Mr. Henshaw could not find any case in Utah that construes a counterclaim as an answer or an affirmative defense.

In Sill v. Hart 128 P.3d 1215, (Ut. App. 2005), this Court stated:

¶ *[T]he term "complaint" is frequently interpreted in Utah case law as including counterclaims, see, e.g., State ex rel. Road Comm'n v. Parker, 13 Utah 2d 65, 368*

1. However, even if the Kings had asserted that Mr. Henshaw was required to prove that Raymond's interest in the water rights passed to Mildred upon Raymond's death, then to Mrs. Henshaw and ultimately to Mr. Henshaw, as an affirmative defense, they would still be required to show they had standing to assert that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death. See Point IV, *infra*.

P.2d 585, 587 (1962) ("[N]either under our rules or elsewhere, can a counterclaimant cast himself in any other role than that of a plaintiff.") (Emphasis added).

Therefore, under clear and controlling law, and even under this Court's own decision in Sill v. Hart, the Kings' counterclaim asserting a cause of action for quiet title, cannot be considered an answer or an affirmative defense, and the Court's assertion that "*The Kings' challenge to Henshaw's ownership of the water rights was part of the Kings' defense to Henshaw's quiet title and easement claims,*" is incorrect both as a matter of fact and as a matter of law. Furthermore, under the holding of Sill v. Hart, as plaintiffs in their counterclaim, the Kings were legally required to prove that they had standing to assert that Raymond's water rights did not pass to Mildred Watrous upon Raymond's death, then to Mrs. Henshaw and ultimately to Mr. Henshaw. They did not do so because they cannot do so.²

POINT II

THE COURT'S ASSERTION THAT "ALTHOUGH HENSHAW DID NOT INITIALLY ASSERT A QUIET TITLE OR EASEMENT ACTION, THE TRIAL COURT CONFORMED THE PLEADINGS TO THE EVIDENCE SO THAT HENSHAW'S CLAIMS TO WATER RIGHTS AND AN EASEMENT WERE AT ISSUE," IS FACTUALLY AND LEGALLY INCORRECT.

In footnote 3 of its memorandum decision, the court states: "*Although Henshaw did not initially assert a quiet title or easement action, the trial court conformed the pleadings to the evidence so that Henshaw's claims to water rights and an easement were at issue.*" That assertion is both factually and legally incorrect.

A. The Court's Assertion That "Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue," Is Factually Incorrect.

2. See also, Jenkins v. Swan, 675 P.2d 1145 (Utah 1983) declaring "*Anyone bringing an original proceeding---a dispute that is being presented to the courts for the first time---must satisfy the traditional standing test.*" and Gedo v. Rose, 2007 P.3d (2007 Ut. App 154).

Both the trial court's Order on Directed Verdict and the transcript of the hearing on the Kings' motion for a directed verdict clearly and unequivocally proves that the trial court granted the Kings' motion for a directed verdict before it granted Mr. Henshaw's motion to confirm his pleadings to the evidence. Therefore, as a matter of fact, the Kings' assertion that Mr. Henshaw was required to prove that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death could not be a defense to any alleged quiet title action on the part of Mr. Henshaw, because the trial court granted the Kings' motion for a directed verdict on that issue before it permitted Mr. Henshaw to amend his complaint to conform with the evidence, and allegedly assert a quiet title claim.

It is a factual and logical impossibility for the Kings' assertion that Raymond's water rights did not pass to Mildred Watrous upon Raymond's death to be a "[P]art of the Kings' defense to Henshaw's quiet title and easement claims," and that "*Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue,*"³ when the trial court granted the Kings' motion for a directed verdict, ruling that Raymond's water rights did not pass to Mildred upon Raymond's death, then to Barbara Henshaw and ultimately to Mr. Henshaw, before granting Mr. Henshaw's to amend the pleadings to the evidence.

Therefore, the Court's conclusion that and "*Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The*

3. If Mr. Henshaw were required to file a quiet title action to clear title to Raymond's interest in the water rights, which he is not, he would have to file it against the people and/or entities who had standing to assert a claim against Raymond's estate alleging that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death. He would not need to file such a action against the Kings who have no claim of right, title or interest, of any nature whatsoever, in the water rights they sold to the Watrouses.

Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue," is factually and logically incorrect.

B. The Court's Conclusion That "Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue," Is Legally Incorrect.

As a matter of law, the Court's conclusion that "*Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue,*" is legally incorrect.

As set forth in subsection A. of this Point, both the trial court's Order on Directed Verdict and the transcript of the hearing on the Kings' motion for a directed verdict clearly and unequivocally prove that the trial court granted the Kings' motion for a directed verdict before it granted Mr. Henshaw's motion to confirm his pleadings to the evidence. Therefore, as a matter of law, the Kings' assertion that Mr. Henshaw was required to prove that Raymond's water rights passed to Mildred Watrous upon Raymond's death could not be a defense to any alleged quiet title action on the part of Mr. Henshaw, because the trial court had already granted the Kings' motion for a directed verdict on that issue before it permitted Mr. Henshaw to amend his complaint to conform with the evidence.

One could not have a legal responsibility to present evidence supporting a claim or cause of action that had been dismissed from the lawsuit. Therefore, the Court is incorrect, as a matter of law, in its conclusion that "*Although Henshaw Did Not Initially Assert A Quiet Title Or Easement Action, The Trial Court Conformed The Pleadings To The Evidence So That Henshaw's Claims To Water Rights And An Easement Were At Issue.*"

C. Both As A Legal And Factual Matter, The Kings' Counterclaim Could Not Be An Affirmative Defense To Any Claim Of Ownership Of Raymond Watrous' Water Rights By Mr. Henshaw, As The Court Incorrectly Concludes.

If, as the Court incorrectly concludes, the Kings' counterclaim was actually an affirmative defense to Mr. Henshaw's claim of ownership to Raymond's water rights, the jury would have never been asked to determine if the water rights should be quieted in the Kings.

After the trial court ruled that Mr. Henshaw had not proven that Raymond's water rights passed to Mildred upon Raymond's death and ultimately to Mr. Henshaw, the jury was required to decide if the Kings in fact owned the water rights that they admitted they sold and deeded to the Watrouses.⁴ If, as the Court incorrectly concludes, the Kings' counterclaim was actually an affirmative defense to Mr. Henshaw's claim of ownership to Raymonds' water rights, there was no legal or logical reason to ask the jury to determine if the water rights should be quieted in the Kings.

The Court has not suggested that the Kings' counterclaim was an affirmative defense to Mr. Henshaw's claim of ownership of Mildred's water rights. Furthermore, Mr. Henshaw put on the same evidence of ownership of Mildred's water rights as he did of Raymond's water rights. Ergo, under the Court's reasoning, if he failed to prove Raymond's rights passed to him, he also failed to prove Mildred's rights passed to him, and the trial court should have ruled that Mr. Henshaw failed to prove any of the water rights passed to him.

The fact that the trial court instructed the jury to determine if the water rights should be quieted in the Kings, without informing them that it has already ruled that Raymond's water rights did not pass to Mr. Henshaw, is proof that the Kings' quiet title action was not an affirmative defense to Mr. Henshaw's claim of ownership to Raymond' water rights. The

4. The jury found that the Kings had sold the water rights to the Watrouses (Record at 1114, ¶¶ 2 and 6).

Kings' quiet title action was just that, a counterclaim and not any sort of affirmative defense⁵

D. The Kings Were Required To Prove At The Time Mr Henshaw First Challenged Their Standing That They Had Standing To Assert That Raymond's Interest In The Water Rights Did Not Pass To Mildred Upon Raymond's Death

It is undisputed that Mr Henshaw challenged the standing of the Kings to claim that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death from virtually the beginning of this case. Therefore, the Kings were required to prove from the first time Mr Henshaw raised the issue of the Kings' jurisdiction that they had standing. They did not do that, because they could not that

The trial court was required to determine if the Kings had standing to claim that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death as soon as Mr Henshaw challenged the Kings standing. It did not do so because the Kings do not have standing. Likewise, this Court must determine and explain how the Kings allegedly have standing to assert that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death at the time Mr Henshaw first challenged the Kings Jurisdiction, not after the trial court granted the Kings' motion for a directed verdict. It did not do so because it cannot do so, because the Kings do not have standing. Therefore, neither the trial court nor this Court can find that the Kings have standing to assert that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death. That conclusion cannot be reached by claiming the Kings' quiet title action was simply an affirmative defense to Mr Henshaw's case as it was

⁵ Furthermore, the Kings admit that "The status of Raymond Watrous' water rights was not a "claim asserted by them or even an affirmative defense" (Kings' brief page 29, ¶ 3)

amended to conform to the pleadings, after the trial court granted the Kings' motion for a directed verdict.

POINT III

THE COURT'S CONCLUSION THAT MR. HENSHAW HAD THE BURDEN OF ESTABLISHING OWNERSHIP OF WATER RIGHTS IS INCORRECT.

A. Both As A Matter Of Fact And As A Matter Of Law, Mr. Henshaw Did Not Have The Burden Of Establishing Ownership Of The Water Rights.

As established in Point II of this Brief, the trial court granted the Kings' motion for a directed verdict before it granted Mr. Henshaw's motion to confirm his pleadings to the evidence. Therefore, Mr. Henshaw did not, and could not, both as a factual and legal matter, have the burden of establishing ownership of Raymond's water rights, after the trial court had already ruled that he did not have ownership of Raymond's water rights, and the Court's conclusion to the contrary is simply incorrect.

B. The Kings Had The Burden Of Proving That Mr. Henshaw Did Not Own Raymond's Water Rights, Which Were Transferred To Mrs. Henshaw After Raymond's Death And Ultimately To Mr. Henshaw From Mrs. Henshaw.

The undisputed facts of this case are that the Kings deeded the water rights to the Watrouses, that Mildred deeded the real property owned by her and Raymond, as well as the water rights purchased from the Kings, to Mrs. Henshaw by warranty deed and that Mrs. Henshaw then transferred the real property and the water rights she purchased from Mildred to Mr. Henshaw by warranty deed. (Record at 200 and 995 #12). Therefore, as a matter of law Mr. Henshaw established ownership of the water rights and the Kings were required to prove that he did not acquire ownership of the water rights in the series of the deeds from the Kings to the Watrouses, from Mildred to Mrs. Henshaw and from Mrs. Henshaw to Mr. Henshaw.

Under Utah law, a deed is deemed to be valid and passes all of the right, title and interests contained in the deed.

In pertinent part UCA §57-1-12 provides:

(2) A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, the grantee's heirs, and assigns:

(a) of the premises named in the warranty deed;

(b) of all the appurtenances, rights, and privileges belonging to the premises named in the warranty deed; and

(c) with covenants from the grantor, the grantor's heirs, and personal representatives, that:

(i) the grantor lawfully owns fee simple title to and has the right to immediate possession of the premises;

(ii) the grantor has good right to convey the premises;

(iii) the grantor guarantees the grantee, the grantee's heirs, and assigns in the quiet possession of the premises;

(iv) the premises are free from all encumbrances; and

(v) the grantor, the grantor's heirs, and personal representatives will forever warrant and defend the title of the premises in the grantee, the grantee's heirs, and assigns against all lawful claims whatsoever.

(3) Any exception to the covenants described in Subsection (2)(c) may be briefly inserted in the warranty deed following the description of the land.

In Petrofesa v. Denver & Rio Grande Western R. Co., 169 P.2d 808, 110 Utah 109 (1946), the Utah Supreme Court declared:

A warranty deed conveys the fee simple title 'together with all the appurtenances, right and privileges thereunto belonging,' by force of Sec. 78--1--11, U. C. A. 1943, unless some rights are reserved by the terms of the conveyance.

The holding of Petrofesa v. Denver & Rio Grande Western R. Co., was reiterated in Pollei v. Burger 464 P.2d 377, 23 Utah 2d 381 (1970) when the Utah Supreme Court stated:

*A warranty deed conveys the fee simple title "together with all the appurtenances, rights and privileges thereunto belonging," by force of Sec. 78-1-11, U.C.A. 1943, unless some rights are reserved by the terms of the conveyance. * * **

In Roberts v. Roberts, 584 P.2d 378 (1978), citing Stephens v. Burton, 546 P.2d 240 (1976), the Utah Supreme Court once again stated:

In Utah, a deed which conveys land to a grantee also conveys the right to use appurtenant water, unless expressly reserved. (fn2) Appurtenant water is the amount of water beneficially used on the land "before and at the time of the sale."

In Bown v. Loveland, 678 P.2d 292 (Utah 1984), citing U.C.A., 1953, § 57-1-12 and Hatch v. Bastian, Utah, 567 P.2d 1100 (1977), the Utah Supreme Court again stated:

A warranty deed executed without any reservations conveys in fee simple all of the rights and interests the grantor has in the premises therein described.

Therefore, when Mildred conveyed her property to Mrs. Henshaw, as a matter of law, the water rights she and Raymond purchased from the Kings transferred, by law, to Mrs. Henshaw. Likewise, when Mrs. Henshaw transferred the property and the water rights she obtained from Mildred, those water rights passed, as a matter of law, to Mr. Henshaw, because neither the warranty deed from Mildred to Mrs. Henshaw nor the warranty deed from Mrs. Henshaw to Mr. Henshaw contained any reservation of any type of right, title or interest.

Utah law mandates that anyone challenging the validity of a deed must prove by clear and convincing evidence that the deed is invalid. Therefore, if the Kings wished to challenge the validity of the series of deeds transferring the water rights to Mr. Henshaw, they had to provide the trial court with clear and convincing evidence that the series of deeds transferring the water rights to Mr. Henshaw were invalid, and they had to prove to the trial court that they had standing to challenge the validity of the deeds.

In Northcrest, Inc. v. Walker Bank & Trust Co., 248 P.2d 692 (Utah 1952), citing Thornley Land & Livestock Co. v. Gailey, 105 Utah 519, 143 P.2d 283; and Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933) the Utah Supreme Court stated that: "*Undisputed is the plaintiff's contention that one who asserts the invalidity of a deed must so prove by clear and convincing evidence.*" Likewise in Nikols v. Goodman & Chesnoff, 206 P.3d 295 (Ut. App. 1009), this Court citing In re Estate of Hock, 655 P.2d 1111 (Utah 1982); Jacobson

v. Jacobson, 557 P.2d 156 (Utah 1976) and Northcrest, Inc. v. Walker Bank & Trust Co.,
supra, stated:

*The Utah Supreme Court requires a party that seeks to alter or rebut a deed or other
such document to do so by clear and convincing evidence.*

Therefore, and contrary to the Court's conclusion, it was the Kings that had the burden of
proving that Mr. Henshaw did not own the water rights that he received from his mother by
warranty deed and that his mother received from Mildred Watrous by warranty deed, because
it is undisputed that Mildred Watrous deeded the water rights to Mrs. Henshaw and that Mrs.
Henshaw deeded the water rights to Mr. Henshaw.

The water rights owned by Mildred Watrous passed, as a matter of law, to Mr.
Henshaw pursuant to the holdings of Petrofesa v. Denver & Rio Grande Western R. Co.,
Pollei v. Burger, Roberts v. Roberts, Stephens v. Burton, Bown v. Loveland, and Hatch v.
Bastian, supra, and the Kings had the burden to establish by clear and convincing evidence
that the deeds from Mildred to Mrs. Henshaw and from Mrs. Henshaw to Mr. Henshaw were
not valid and the water rights did not pass to Mr. Henshaw, as a matter of law. Ergo, the
Courts conclusion that Mr. Henshaw was required to prove he owned the water rights the
Kings admit they sold to the Watrouses, that was transferred to him by a series of valid
warranty deeds, is incorrect as a matter of law.

POINT IV

**THE COURT'S CONCLUSION THAT "*THERE IS NO STANDING ISSUE HERE
BECAUSE THE DIRECTED VERDICT IN FAVOR OF THE KINGS WAS NOT
ENTERED ON A CLAIM ASSERTED BY THE KINGS,*" IS FACTUALLY AND
LEGALLY INCORRECT.**

- A. By Filing Their Counterclaim, The Kings Became Plaintiffs And Became Obligated To
Establish That They Have Standing To Assert That Raymond Watrous' Interest In The
Water Rights They Sold To The Watroues Did Not Ultimately Pass To Mr. Henshaw.

As previously established in this Brief, it is indisputable that the Kings did not file an affirmative defense in response to either Mr. Henshaw's Complaint or Amended Complaint asserting that Raymond's water rights did not pass to Mildred upon his death. Likewise, as previously established in this Brief, the Kings' counterclaim cannot be considered to be an answer or an affirmative defense to Mr. Henshaw's Amended Complaint, and the Kings did not file any motion asserting Raymond's water rights did not pass to Mildred upon his death.

As a matter of law, by filing their counterclaim, the Kings became plaintiffs in this case. See State v. Parker, and Sill v. Hart, *supra*. As plaintiffs, the Kings must prove that they have standing to assert that Raymond interest in the water rights did not ultimately pass to Mr. Henshaw. See, Jenkins v. Swan, 675 P.2d at 1148, 1151 (Utah 1983) holding:

Anyone bringing an original proceeding---a dispute that is being presented to the courts for the first time---must satisfy the traditional standing test.

The Kings did not do that, and they cannot do that, because when they sold the water rights to the Watrouses, they gave up all claims of right, title and interest, of any nature whatsoever to water rights and, therefore, have no legal or equitable interest in what happened to the water rights upon Raymond's death.

Because the Kings gave up all claims of right, title and interest, of any nature whatsoever, to water rights when they sold the water rights to the Watrouses, the Kings cannot comply with the holdings of Stromquist v. Cokayne, 646 P.2d 746 (Utah 1982), Jenkins v. State, Utah, 585 P.2d 442 (1978) that require them to prove they have "*a legally protected right*" in the water rights they sold to the Watrouses or any interest in the water rights as mandated by Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986), Blodgett v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Ut. App. 1988) and Wade v. Burke, 800 P.2d 1106 (Ut. App. 1990).

B. Even If The Court Was Correct And The Kings' Counterclaim Could Be Construed As A Defense To Mr. Henshaw's Amended Complaint, The Kings Are Still Required To Prove They Have Standing To Assert That Raymond's Water Rights Did Not Pass To Mildred On Raymond's Death And Ultimately To Mr. Henshaw.

As previously established in this Brief, the Court's conclusion that the Kings' assertion that Mr. Henshaw was required to prove that Raymond's water rights passed to Mildred upon Raymond's death could not be a defense to any alleged quiet title action on the part of Mr. Henshaw, because the trial court granted the Kings' motion for a directed verdict on that issue before it permitted Mr. Henshaw to amend his complaint to conform with the evidence. However, even if the Court were correct in its conclusion that the Kings' quiet title action was a defense to Mr. Henshaw's claims, and that the trial court allowed Mr. Henshaw's complaint to conform to the evidence established at trial, the Kings still had the obligation to prove they have standing to assert that Raymond's water rights did not pass to Mildred upon Raymond's death and ultimately to Mr. Henshaw.

There are numerous affirmative defenses that a party must prove they have standing to assert. If a party asserts qualified immunity as an affirmative defense, that party has the burden of proving that he/she/it is a governmental agency or an employee of a governmental agency, acting within the scope of his or her governmental duties and thus has standing to assert qualified immunity. In Hart v. Salt Lake Cty. Comm., 945 P.2d 125 (Ut. App. 1997), this Court, citing Nelson v. Salt Lake City, 919 P.2d 568, 574 (Utah 1996) declared:

In addition to characterizing governmental immunity as an affirmative defense, the supreme court has specifically stated that the defendant has the burden of proving that it is shielded from liability by governmental immunity.

Terry v. Retirement Bd. 157 P.3d 362 (Ut. App. 2007) burden of proof on parties seeking to assert estoppel against governmental agencies, Riggle v. Daines Manufacturing Co., 463 P.2d

1, 23 Utah 2d 328 (Utah 1969), burden of proof on the defendants to establish their defense of usury.

Because the Kings admitted, under oath, that they sold the water rights that are at issue in this case to the Watrouses, and that Mr. Henshaw now owns those water rights, (Jack King Deposition pages 9-10, lines 21-8; page 25, line 21; Record at 1127 ¶ 3), the Kings have the burden of proving that they have some authority to act on the part of Raymond and Mildred's heirs or devisees to assert that Raymond's interest in the water rights did not pass to Mildred upon Raymond's death and ultimately to Mr. Henshaw. When the Kings sold the water rights to the Watrouses, without any reservation of rights in the water rights, they relinquished all right, title and claim of any nature whatsoever to the water rights. Petrofesa v. Denver & Rio Grande Western R. Co., Pollei v. Burger, Roberts v. Roberts, Stephens v. Burton, Bown v. Loveland, and Hatch v. Bastian, supra. Therefore, they have no interest in the water rights that they could legally or equitably assert on their own behalf.

Because the Kings transferred all right, title and interest, of any nature whatsoever, they had to the water rights when they sold the water rights to the Watrouses, without any reservations of any type, in order for the Kings to assert that they have standing to claim Raymond's water rights did not pass to Mr. Henshaw through Mildred's warranty deed to Mrs. Henshaw and Mrs. Henshaw's warranty deed to Mr. Henshaw, the Kings would have to prove that they are authorized to act on behalf of, and have standing to represent, some person or entity who had standing to assert a claim against the Estate of Raymond Watrous, at the time of his death. The Kings have not done that. They cannot do that.

Therefore, even if this Court was correct, and the Kings' counterclaim could be construed as a defense to Mr. Henshaw's amended complaint, the Kings are still required to prove they have standing to assert that Raymond's water rights did not pass to Mildred on

Raymond's death and ultimately to Mr. Henshaw. The Kings cannot admit that they sold the Watrouses the water rights, without any reservation of any type in the water rights, and then claim they have standing to assert that Raymond's water rights did not pass to Mildred upon his death without proving they are authorized to represent some person or entity who had standing to assert a claim against Raymond's estate at the time of his death. The Kings have not done that; they cannot do that, and as a matter of law they are required to do so, even if, as the Court incorrectly concluded, their quiet title action was simply an affirmative defense to Mr. Henshaw's claims that were conformed to the evidence, after the trial court granted the Kings' motion for a directed verdict and ruled that Mr. Henshaw had not proven that Raymond's interest in the water rights passed to Mildred upon Raymond's death.

CONCLUSION

Because the Court's memorandum decision is incorrect both factually and legally, the Court must vacate the decision and enter a decision based on the actual facts and the applicable law as applied to the actual facts.

Dated this 10th day of January 2010.

A handwritten signature in black ink, appearing to read "Charles A. Schultz", written over a horizontal line.

Charles A. Schultz
Attorney for Dee Henshaw

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January 2010, I HAND DELIVERED
two true and correct copies of this Motion for Rehearing to the person(s) at the
addresses listed below:

David R. Williams
WOODBURY AND KESTLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'Charles A. Schultz', written over a horizontal line.

Charles A. Schultz